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No. 807

In the Supreme Court of the United States

OCTOBER TERM, 1933

THE MISSISSIPPI VALLEY BARGE LINE COMPANY, A CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH, 1934.

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 93), *Mississippi Valley Barge Line Co. v. United States et al.*, is reported at 4 F. Supp. 745. The report of the Interstate Commerce Commission (R. 19) *Sugar Cases of 1933*, is published at 195 I.C.C. 127.

QUESTIONS PRESENTED

The principal question presented is the validity of an order of the Interstate Commerce Commission, as amended, (R. 64, 67) the effect of which was to permit certain railroads to reduce their rates on sugar in order to meet water and water-and-truck competition.

Subordinate questions are (1) whether the order is violative of the congressional policy announced in Section 500 of Transportation Act, 1920, to promote, encourage and develop water transportation; (2) whether the Commission denied appellant a fair hearing; (3) whether the petitioner has such an interest in the subject matter as entitles it to maintain this suit.

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the appendix.

STATEMENT

This is an appeal from a final decree (R. 107) of the specially-constituted (three-judge) District Court dismissing the appellant's bill which sought to enjoin and set aside the Commission's order of July 3, 1933 (R. 64), as amended by order of July 18, 1933 (R. 67), made in a proceeding entitled Investigation and Suspension Docket No. 3814, *Sugar from Gulf and South Atlantic Points* (*Sugar Cases of 1933*).

The proceeding was initiated by an order of the Commission itself, made under the provisions of section 15 (7) of the Interstate Commerce Act, in which the Commission entered upon hearings concerning the lawfulness of the rates, etc., stated in the schedules enumerated and described in said order, and which, among other things, suspended the operation of those schedules so far as they proposed changes in the rates on sugar, in carloads. (R. 64.)

By the schedules in question filed with the Commission to become effective October 1, 1932, on 30 days' notice, certain railroads, operating lines on both sides of the Mississippi River, proposed to reduce their rates on sugar from New Orleans and other southern refining points to destinations in the so-called Illinois district and certain intermediate points, the most important destinations being Chicago and St. Louis. (R. 35–36.)

The Mississippi Valley Barge Line Company, petitioner below and appellant here, and others, filed protests against the proposed reduced rates of the rail carriers (R. 2, 73), and these protests led the Commission to exercise its suspension power, and enter upon the hearings which were held shortly thereafter, for the purpose of determining the lawfulness of the proposed rail rates. (R. 36, 74.)

The railroads which had proposed the reduced rates in question were made respondents in the

proceeding. Principal among these was the Illinois Central, operating a direct rail line from New Orleans to Chicago and serving water-competitive points such as Cairo, Ill., St. Louis, Mo., Peoria, Ill., Evansville, Ind., Louisville, Ky., and Cincinnati, O.

The Mississippi Valley Barge Line Company, which appeared as a party protestant, is a private corporation operating a line of towboats and barges on the Mississippi and Ohio Rivers and is engaged as a common carrier of freight, including sugar, between the ports of New Orleans, Cincinnati and St. Louis, and intermediate ports. This company, and several other barge lines, are in keen competition with the railroads serving the same ports and inland points beyond.

Other proceedings, four in number, relating to sugar rates, were also pending before the Commission at the same time and all were disposed of in one report entitled *Sugar Cases of 1933*. The scope of the five cases was described in the report as representing "collectively a contest among railroad, water, and motor truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific Coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market." (R. 21) The other four cases were Investigation and

Suspension Docket No. 3829, *Sugar from Eastern Points to Central Territory;* Investigation and Suspension Docket No. 3837, *Sugar from New Orleans to Arkansas, Missouri, and Oklahoma; Fourth Section Application No. 14080,* on reargument, relating to the transcontinental rates on sugar from San Francisco Bay points to Chicago, Milwaukee, St. Louis and related points; and *Fourth Section Application No. 14816,* relating to the rates on sugar from producing points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota and Iowa to Chicago, Milwaukee, St. Louis and related points.

The five cases in the main embraced the same traffic as *Sugar Cases of 1922,* 81 I.C.C. 448, out of which came a general readjustment of the *all-rail* sugar rates, which stood without substantial modification for about 10 years. Then the conditions materially changed. "Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the respective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic

and increasing their revenues to at least some extent." (Report, R. 21–22.)

The appellant seeks to enjoin only the order in I. & S. No. 3814, relating primarily to the rates from New Orleans. This case is dealt with separately in the Commission's report (R. 35–50) but frequent reference to the facts in that case is made in the discussion of the first case. (R. 23–35.)

Hearing was held at Washington, D.C., in October and November 1932, and a large volume of evidence was submitted, including evidence on behalf of appellant;[1] briefs were filed; the case was orally argued and on July 3, 1933, the Commission issued its report. (R. 102.)

A table in that part of the report relating to I. & S. 3814, (R. 88) shows the rates then in effect and the proposed rates. In each instance two rates were proposed, one based on a minimum carload weight of 80,000 pounds, the other based on a minimum of 60,000 pounds. These were proposed for contemporaneous application, and under them a carload weighing 80,000 pounds or more would take a lower rate than a car loaded only to 60,000 pounds. Of the proposed rates the most important were those to Chicago and St. Louis. These proposed rates were, to Chicago, 30 cents, minimum 80,000 pounds, and 39 cents, minimum 60,000 pounds (former rate 56 cents); to St. Louis, 28 cents, minimum

[1] This evidence is not before the Court, nor was it introduced below.

80,000 pounds, and 34 cents, minimum 60,000 pounds (former rate 52 cents). The lower of the proposed rates, based on the 80,000-pound minimum, the Commission found, would be used on most of the traffic, as they would result in the lower per-car charges except on shipments weighing not much in excess of 60,000 pounds. "The protests and the record relate to them almost entirely," the Commission said, and "we will deal specifically only with these rates." The rates with the 60,000-pound minimum are to take care of dealers, principally at small interior points, who require limited quantities of sugar or whose storage facilities are limited. (R. 38.)

The Commission found (R. 50) that the respondents had justified the proposed rates with the 60,000-pound minimum. It further found (R. 50) they had not justified the proposed rates with the 80,000-pound minimum, but that they had justified rates 4 cents higher. "So far as the 80,000-pound minimum is concerned," the Commission said (R. 50), "this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis.

Accordingly, an order was entered, on July 3, 1933 (R. 65), vacating and setting aside the suspension order in I. & S. 3814 so far as it related to rates based on a minimum of 60,000 pounds. The same order required the respondents in I. & S. 3814 to cancel such of their schedules as named rates based on a minimum of 80,000 pounds.

Respondents accepted the Commission's finding that rates 4 cents higher than they had proposed on a minimum of 80,000 pounds had been justified, and on July 18, 1933, the Commission issued an amendatory order (R. 67) which authorized them to establish, in lieu of the rates contained in the schedules required to be canceled, the rates approved in the report, i.e., rates 4 cents higher than those originally proposed, based on the 80,000-pound minimum, such rates to become effective not earlier than July 29, 1933.

The same order fixed July 29, 1933, as the effective date of the previous order vacating and setting aside the suspension order so far as it related to rates based on a minimum of 60,000 pounds.

The rates based on the 60,000-pound minimum went into effect and became operative on July 29, 1933, and those based on the 80,000-pound minimum went into effect and became operative on July 31, 1933. (R. 77, 102.)

Proceedings in Court below

Bill was filed by the Mississippi Valley Barge Line Company to enjoin and set aside the Commission's orders of July 3 and 18, 1933, naming the United States and the Commission as defendants, and they filed answers. (R. 68, 73.) A number of the rail carriers who had been respondents in the Commission proceeding[2] intervened as de-

[2] Illinois Central Railroad Company; Louisville & Nashville Railroad Company; Southern Railway Company; Cin-

fendants (R. 81) and filed a joint answer (R. 81). No one intervened in behalf of petitioner. Hearing was held before a three-judge court consisting of Circuit Judge John B. Sanborn and District Judges Charles B. Faris and Charles B. Davis, August 15, 1933.

The Commission record was not introduced before the Court. The only evidence there offered consisted of a few affidavits that were offered by petitioner and two by the railroads. These affidavits have been narrated and appear in the record here under the heading "Statement of Evidence" (R. 129–163). These affidavits are again narrated in appellant's brief, pages 21–36, under the heading "Abstract of Testimony on behalf of Appellant." This testimony was not before the Commission. None of the evidence there is in this record. Attention is called to the statement in the record (R. 129–130), preceding the narration of the above-mentioned affidavits, noting our objection to these affidavits.

October 13, 1933, the Court rendered its opinion sustaining the validity of the Commission's order. (R. 93.) With respect to the Commission record, the Court said (R. 97):

> The record of the proceedings before the Commission has not been presented to this

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cinnati, New Orleans & Texas Pacific Railway Company; The Alabama Great Southern Railroad Company; New Orleans & Northeastern Railroad Company.

> Court, and the affidavits which have been received afford only an imperfect and incomplete picture of the situation. In view of the absence of the record of the evidence which the Commission had before it, we must accept its findings as conclusive. (Citing cases.)

The Court made separate findings of fact and conclusions of law. (R. 100.) Final decree denying the prayer of and dismissing the bill was filed November 21, 1933. (R. 107.) From the final decree this direct appeal was taken.

SUMMARY OF ARGUMENT

I. Appellant's principal contention, that the Commision's order is contrary to Congressional policy, is answered by the facts stated and found in the Commission's report, which show that the order, permitting certain reduced rail rates to be made effective, after full investigation disclosing that they were lawful rates, is in no respect violative of or inconsistent with that policy, which sought on the one hand to promote water transportation and on the other to foster and preserve in full vigor *both* rail and water transportation.

The Commission found that the proposal of the rail carriers to reduce their rates was to afford them equality of opportunity in their competition with the water lines, and that the rail carriers had proposed the reductions with the hope of retriev-

ing their losses of traffic and increasing their revenues to at least some extent, practically the entire sugar traffic from the New Orleans district having been lost to the water carriers. This loss of traffic was not due to superior transportation service by the water carriers but was due to the substantially lower rates maintained by them than by the railroads. The Commission further found that the rail carriers are in poor financial condition and need increased revenue. The Commission further found that the *proposed* rates were high enough to more than pay the cost of the service, from which it follows that the *approved* rates, substantially higher than those proposed, are sufficient to yield a wide margin of revenue above the cost of the service. While the Commision recognized that the loss of traffic by the rail carriers was a matter for its serious consideration, it yet did not overlook the rights of the water and truck carriers and the value of their services to the public. This is reflected in its action in declining to approve rates as low as those proposed by the rail lines. The contention of the appellant is, in substance, that the railroads should have been required to maintain their former rates, which were greatly in excess of the rates of the water carriers, so that the latter might continue to handle practically all of the sugar traffic. The action of the Commission in permitting the rail carriers to make reductions in their rates to put them on a basis of competitive equality with the

water lines is not contrary to Congressional policy. That policy does not contemplate a rate adjustment that will enable the water lines to obtain practically all of a competitive traffic. The true policy, as shown by the applicable statutes, is that the rates shall be adjusted so as to be reasonable and fair to both rail and water carriers.

(a) No provision of Transportation Act, 1920, or of the Interstate Commerce Act guarantees to appellant that the rates of competing railroads will be kept high enough to enable appellant to maintain rates which, though differentially lower, are yet sufficiently high to enable appellant to continue in business as a profitable operation. Section 500, Transportation Act, 1920, is a declaration of policy in a statute containing numerous important provisions for the regulation of interstate commerce, administration of which is delegated to the Commission, and numerous expressions of the Commission show that it has regarded it as its duty to give effect in rate making and otherwise to the policy expressed. But it is manifestly impossible to spell out of the declaration in section 500 any guaranty that competitive railroad rates will be kept at any particular level. Numerous provisions in Transportation Act, 1920, and in the later enacted Denison Act, confer rights, remedies, and exemptions upon water lines and appellant is entitled to the protection afforded and advantages given by those specific provisions. But if the general declaration

of policy were interpreted as affording a guaranty to water carriers of their continuance in existence as profitable operations, at all events, then the language of the declaration could be carried to vague, unreasonable, unlimited, and unforeseen lengths. Moreover, appellant's contention overlooks the declared purpose of Congress to foster and preserve railway transportation as well as water transportation. In the 1920 Act Congress enacted many provisions looking to the development and maintenance of an *adequate railway service*, in the public interest. *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 585; *New England Divisions Case*, 261 U.S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 477–478. Recently the Congress has enacted the Emergency Railroad Transportation Act, 1933, "to relieve the existing national emergency in relation to interstate railroad transportation." The precarious financial condition of the railroads has not been due entirely to the economic depression, but in large part to competition of other transportation agencies, such as trucks, busses, and waterways. No provision of law prevents the railroads from meeting or attempting to meet this competition through the publication of reduced rates not violative of any statutory provision. It seems certain that there is nothing in section 500 of Transportation Act, 1920, relied upon by appellant, that prevents the railroads from making reductions in their rates, down

to a level well above the cost of furnishing the service, nor that prevents the Commission from permitting such reduced rates when, after full investigation and ascertainment of the facts, the Commission is unable to find that such reduced rates are unlawful in any respect.

(b) The contention that the Commission's report admits the order sanctions a violation of section 500 is unfounded.

II. Appellant was accorded a full and fair hearing and the Commission's denial of its petition for rehearing was not an abuse of discretion. *A., T. & S.F. Ry. Co.* v. *United States,* 284 U.S. 248, is not apposite here. There were no fundamental changes in conditions during the short period intervening between the close of the hearing in the case at bar in November, 1932, and the date of the Commission's report in July, 1933. *United States* v. *Northern Pac. Ry. Co.,* 288 U.S. 490, 494.

III. No showing having been made that the Commission's order subjects appellant to legal injury, actual or threatened, appellant is without right to maintain this suit. Appellant, a common carrier engaged in transportation by water from New Orleans to points on the Mississippi and Ohio Rivers, competes with the railroads for traffic, and particularly for the sugar traffic under consideration. Although it protested against the proposed reduced rail rates, and was a party to the Commission proceeding, it is not a respondent to the

order it here attacks, nor does the order make any requirement of it or in connection with it or its rates. The sole basis for its complaint is that since the Commission by its order declined to prevent the railroads from reducing their rates, and gave its authorization to the establishment of reduced rates, appellant's competitive position will not be as favorable in the future as it has been in the past. But appellant has no legal right, either by statute or at common law, to carry any particular share of prospective traffic. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148; *A., T. & S. F. Ry. Co.* v. *United States,* 279 U.S. 768, 780; *Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249. This case is therefore within the rule of *Edward Hines Trustees* v. *United States, supra,* holding that lumber dealers, who claimed the order infringed their rights both as shippers and as prospective carrier, could not maintain the suit, since they had no right to require carriers to impose certain charges. Similarly appellants have no absolute right to require their rail competitors to impose higher rates than those found lawful by the Commission.

ARGUMENT

I

The order in question, permitting rail carriers to put in force certain reduced rates proposed by them in an effort to regain part of the sugar traffic lost to competing water carriers, is a valid order, in no respect violative of or inconsistent with the Congressional policy to promote, encourage, and develop water transportation, and to foster and preserve in full vigor both rail and water transportation

Appellant's principal contention seems to be that the Commission's order is contrary to the policy of Congress enunciated in section 500 of Transportation Act, 1920, (U.S.C. Title 49, Sec. 142) which reads:

> It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

This contention is answered by the facts stated and found in the Commission's report.[3] These facts show that the action of the Commission complained of, that is, permitting certain reduced rail rates to be made effective, after full investigation which disclosed that they were lawful rates, is in

[3] Since the evidence introduced in the Commission proceeding has not been put before the Court, the correctness of these findings may not be assailed here. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U.S. 114, 116; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 324; *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *C., I. & L. Ry.* v. *United States*, 270 U.S. 287, 295.

no respect violative of or inconsistent with the policy of Congress which sought on the one hand to promote water transportation and on the other to foster and preserve in full vigor *both* rail and water transportation.

Until a few years ago the railroads transported practically all the sugar traffic in question. (R. 37.) But now the all-rail movement from Louisiana is confined almost entirely to occasional, special, or emergency shipments. (R. 37.) Nearly all of the Louisiana production sold in the destination territory in question and in contiguous territory goes *by barge* as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati, or Memphis, whence it is distributed to the interior (R. 36) by rail or motor truck. (R. 34.) In 1932 the barge movement amounted to over 500,000 tons, about ten times as much as moved all-rail from Louisiana points to the same territory. (R. 36.) By far the greater part of the water-borne traffic was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation, on local rates or joint rates with the delivering rail carriers.[4] (R. 36.) A small proportion was simi-

[4] It is significant that although the greater part of this traffic is handled by the Government-owned and operated Federal Barge Line, its officials did not protest to the Commission against the proposed reduced rates of the railroads. This is shown by the Commission report, which states, R. 46: "The Federal Barge Line see no good reason for respondents' proposal, but does not protest. Its policy is to let the rail carriers set the rate level."

larly taken by the appellant barge line and some by the American Barge Line Company. (R. 36.) Tramp, or contract, barge operators also obtained considerable tonnage. (R. 37.)

The loss of this traffic to the barges was not due to superior transportation service afforded by them. For the Commission found that rail shipments generally reached destination in from four to six days, whereas water shipments are on the way two or three weeks. (R. 28.) "Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable," the Commission found. (R. 28.) And further that "Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market." (R. 28.) The Commission further said that "During these days when business men have to watch every penny there is a strong inclination to use the cheapest mode of transportation, even though not altogether satisfactory." (R. 28.)

Evidently the loss of this sugar traffic to the barge lines was due to the lower rates maintained by those carriers than by the railroads.

The all-rail rate to Chicago was 56 cents and to St. Louis 52 cents, minimum 60,000 pounds. These and all the other rail rates, as long as they were

published in the carriers' tariffs and lawfully in force, were required to be strictly adhered to under the provisions of section 6 (7) of the Interstate Commerce Act and section 1 of the Elkins Act. Joint water-and-rail rates applying to through transportation partly by water and partly by rail under a common control, management or arrangement for a continuous carriage or shipment, are also subject to the provisions of those acts. The Mississippi Valley Barge Line Company, the American Barge Line Company and the Federal Barge Line, referred to in the Commission's report as the "standard barge lines", all applied to and obtained from the Commission a certificate of public convenience and necessity, under the provisions of section 3 (e) of the Inland Waterways Corporation Act. See *Through Routes and Joint Rates between Inland Waterways Corporation and other Common Carriers,* 153 I.C.C. 129, 172 id. 525, 181 id. 675, 192 id. 173, 192 id. 663; *Application of Mississippi Valley Barge Line Company,* 167 I.C.C. 41; *Application of American Barge Line Company,* 182 I.C.C. 521. And, as further required by said section 3 (e), the Commission fixed reasonable minimum differentials between the all-rail rates and joint rates in connection with the barge lines. For sugar the differential of the appellant was fixed at 10 cents under the all-rail rate. (See R. 38 and 167 I.C.C. 4.) This usually amounted to about 80 percent of the all-rail rate (R. 39) but this differ-

ential basis has not been strictly adhered to. Under a 10-cent differential, the joint water-and-rail rate from New Orleans to Chicago, when carried by appellant from New Orleans to a port of transshipment, such as Cairo or St. Louis, thence by a rail line to Chicago, would be 46 cents, as compared with the all-rail rate of 56 cents.

But the port-to-port rates of water carriers not owned or controlled by a railroad are not subject to the provisions of the act nor to the jurisdiction of the Commission. This is true even though they participate in some water-and-rail traffic that is subject to the Commission's jurisdiction. Thus the rates of the barge lines in question are wholly free from regulation so far as they apply from New Orleans to important destination points like St. Louis, Cincinnati, Louisville, Evansville and other ports on the Mississippi and Ohio Rivers, and now the great market of Chicago. (R. 27.) For this port-to-port traffic the water lines can make any rate they see fit. As said in the Commission's report in reference to water carriers so far as their port-to-port traffic is concerned,

> Being unregulated, they do not have to publish their rates, are free to change them at will without previous notice, may pay rebates, give allowances, make absorptions, provide storage, perform special services, allow special privileges, and otherwise, secretly or openly, favor individual shippers. (R. 25.)

It is shown that a great deal of the sugar traffic in question moves by barge to river landings and thence by truck to inland destinations. The rates for such transportation are wholly free from the Commission's jurisdiction. Likewise tramp, or contract barge operators, are wholly free from regulation.[5]

Not being bound by rigid rates, the appellant and the American Barge Line Company "took some sugar at lower rates than were charged by the Federal Barge Line." (R. 37.) They do not adhere

[5] In its 46th Annual Report to Congress (1932), at pages 20–21, the Commission said: "There is some demand for the further regulation of the rates and charges of water carriers. Their joint rates with connecting rail lines are under our jurisdiction, but not their port-to-port rates, except in instances where we have permitted rail carriers under the Panama Canal act to continue in control of water carriers. As we stated in our last annual report, the need for public regulation of these port-to-port rates is not a matter which we are authorized to investigate, and in default of thorough investigation we hesitate to express an opinion upon it. This much can be said, however, that information which has come to us in connection with our inquiries into rail rates suggests that there may often be an instability and uncertainty in these port-to-port rates, and a tendency toward purely destructive competition, which are opposed to the public interest as well as to the interests of competing rail carriers. The matter is one which we believe should be carefully considered by the Congress."

In respect of the Commission's jurisdiction over water traffic and rail-and-water traffic see *United States* v. *Munson S.S. Line*, 283 U.S. 43; *In re Jurisdiction over Water Carriers*, 15 I.C.C. 205; *I.C.C.* v. *Goodrich Transit Co.*, 224 U.S. 194; *United States* v. *N.Y. Cent. R.R.*, 272 U.S. 457; *Lehigh Valley R.R. Co.* v. *United States*, 243 U.S. 412.

absolutely to the usual differential basis on all traffic. (R. 37.) Tramp, hereinafter called *contract,* barge operators obtained considerable tonnage *at still lower figures.* (R. 37.)

Evidence of record indicated about what rates the contract barge operators charged, and the Commission's report found: "Rates from the New Orleans district to St. Louis as low as 19 cents on sugar have been quoted by contract barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents." (See Report, R. 40.)

Thus the contract barge rate from New Orleans to St. Louis, it may be said, was between 23 and 29 cents. Contrasted with this was the all-rail rate of 52 cents.

The great difference, as shown above, as between the rates for rail and water carriage accounts for the loss of practically all of this traffic by the railroads to the barges.

The basis for the amount of the proposed reduced rail rate of 30 cents from the New Orleans district to Chicago was the New York-Chicago water rate. (R. 39.) The southern rail carriers were confronted not only with the competition of the so-called standard barge lines and of the contract barge lines on the Mississippi and Ohio Rivers but also with the railroads and the water lines from eastern territory. There is a large movement of sugar to the central western destination territory from New York, N.Y., by the Hudson River, New York State barge canal and the Great Lakes. (R. 24.) There is also competition in that territory with sugar brought through the Panama Canal from San Francisco Bay points, with refined sugar from Havana, Cuba, by ocean steamer as far as Montreal, Canada, and thence by lake vessel to Chicago, as well as sugar by all rail movement from the west coast and from the far western beet sugar producing areas. (R. 24, 55, 58, 60.)

The proposed reduced all-rail rate of 28 cents from New Orleans to St. Louis was based on competition with the contract barge operators on the Mississippi River. (R. 39–40.) In respect of this movement in contract barges, the Commission said:

> The practice of shipping sugar in contract barges developed rapidly last year. At least one of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and

was thus in position to dictate the rates to be charged. It furnished the contract barges with two-thirds of their sugar traffic. It expects to continue to ship much, if not most, of its sugar this year by barge even if the proposed rates are established. Such use as it would make of the all-rail rate would be during the winter. It seems to have no doubt about its ability to obtain a sufficient supply of contract water craft in the future. The refiners have had no difficulty in this respect so far. Just where they might find sufficient facilities to carry the bulk of the sugar in the future is not clear, but among other privately-owned facilities that may be available are those used for the southbound movement of steel. They were used to some extent last year. (R. 43–44.)

This situation caused grave apprehension on the part of the railroads. The Commission continued:

> Respondents are apprehensive about the situation and are convinced that it requires quick action. They fear that if the present tendency is not stopped all the refiners, to protect themselves, will use contract barges or provide their own barges for most of the traffic. Petroleum, steel, and cotton interests have already entered the river-transportation business to a greater or less extent. One of the main purposes of the proposal [to reduce the rail rates] is, therefore, to discourage the refiners in providing their own means of transportation or pat-

> ronizing operators of the contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities. (R. 44.)

The Mississippi Valley Barge Line suggested that the Commission hold the railroads to a rate of 40 cents at Chicago. (R. 39.) In other words, the rail rate from New Orleans to Chicago proposed by the appellant itself was 40 cents, and that proposed by the railroads was 30 cents. The Commission adopted neither of these proposals but fixed the rate at 34 cents.

The appellant further suggested that the Commission hold the railroads to a rate of 38 cents at St. Louis. (R. 41.) The railroads proposed 28 cents. Again the Commission adopted neither proposal but fixed the rate at 32 cents.

One *outstanding* probable effect of the proposed rail rate reductions, the Commission said, would be a narrowing of the amount of the standard barge-line differential. "The present standard barge-line rate from the New Orleans district to St. Louis is 42 cents, which is 80 per cent of the all-rail rate of 50 cents, before adding the surcharge, [the surcharge being 2 cents, making the all-rail rate to St. Louis 52 cents, see tabulation at R. 38] and the resulting 10-cent differential is reflected in the joint barge-rail rates from Louisiana origins to points beyond St. Louis, on which rate, incidentally, storage in transit is allowed, which permits dis-

tribution by rail from the river cities. Indications are that the differential is much too wide from a competitive-service standpoint, for, as we have seen, the standard barge lines are taking most of the business. If respondents are allowed to reduce their rates as proposed, the barge lines will consider the publication of rates differentially lower. If the 80-per cent basis were continued, it would reduce the differential from 10 to 5 cents. The standard barge rate to St. Louis would become 23 cents and the barge-rail rate to Chicago and other points beyond St. Louis, 25 cents, approximating some of the water rates from New York to Chicago. As already indicated, the traffic manager of one of the principal refiners testified that a differential of about 6 cents would probably afford the respective sets of carriers *equality of opportunity* with the barge line[s]. Others were silent. There is a suggestion from some protestants that respondents should have approached the standard barge lines on the subject of a reduction in the differential without the severe reductions in rates here proposed. But a mere reduction in the differential would not put respondents in any better position than they are now to meet the competition of the water lines from New York and the contract-barge competition from the New Orleans district." (R. 44–45.)

In the proceeding before the Commission the rail carriers urged that they should be left reason-

ably free in the exercise of their managerial discretion and that they were within their legal rights in attempting to put the proposed reductions in effect. (R. 22.) The protestants' contentions were principally that respondents had abused their managerial discretion, that the proposed reduced rates were not reasonably compensatory, that they were lower than competition justified, that they would unduly harm the water and truck carriers, disturb long-existing railroad rate relationships, bring on a collapse of the railroad sugar-rate structure, and result in needless sacrifices of revenue. (R. 22.)

The Commission definitely found "that the proposed rates are high enough to pay more than the cost of the service," (R. 49), and in support of this finding referred to the following facts: "The earnings would compare favorably with those of the eastern lines just considered [I. & S. Docket No. 3829, R. 23–35] and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15

cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar." (R. 49.)

It is important to observe that in finding that the *proposed* rates were high enough to cover the cost of the service, the Commission had reference to the rate in the amount as proposed, not to the rate 4 cents higher that it found justified. The *proposed* rate, minimum 80,000 pounds, from New Orleans to Chicago, was 30 cents. This rate, the Commission said, as shown above, would yield $240 per minimum carload. Yet the Commission did not approve that rate. The rate from New Orleans to Chicago, minimum 80,000 pounds, which the Commission did approve, and which is now in effect, was 34 cents and that rate yields a minimum carload revenue of $272, or $32 per carload higher than the proposed rate of 30 cents which was found to be sufficient to pay more than the cost of the service. Under the minimum carload revenue of $272 the car-mile earnings would be 29.8 cents and the ton-mile earnings, on basis of the minimum weight of 80,000 pounds, 7.45 mills. It follows that the rate approved by the Commission yielded revenue materially higher than the cost of the service.

The most important of protestant's contentions, namely, that the proposed rates were lower than

competition justified, was sustained by the Commission. It found that the rates carrying the 80,000-pound minimum, which were the important rates around which the controversy waged, were not justified. Some of the facts and considerations on which this conclusion was based are as follows: A differential of 6 cents for the standard barge lines under the all-rail lines, added to the 23-cent minimum contract barge cost, on account of the superior service of the rail lines, made 29 cents as a minimum rate from New Orleans to St. Louis, which was 1 cent more than the proposed all-rail rate. (R. 41.) "Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 percent differential were applied to that rate, it would reduce to 22.5 cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract barge operators provide. It would no doubt stop the use of the contract barges." (R. 41.) The proposed rates to the water-competitive points as applied also to the interior points in the intermediate territory were generally lower than the water-truck combinations. (R. 42.) The proposed rates as applied to the interior points alone

would therefore [assuming of course there were no corresponding reductions in the water or truck rates] probably bring respondents a heavy traffic, would stop a large part of the distribution of the water-borne sugar, and dry up much of the water movement. (R. 43.) For these and other reasons stated in the report, the Commission did not approve the proposed rates. The rates it did approve were substantially higher. For example, in the case of Chicago the approved rate (34) cents was *13⅓ per-cent* higher than that proposed (32 cents). In the case of St. Louis the approved rate (32 cents) was over *14 percent* higher than that proposed (28 cents).

The Commission found that the rail carriers "are in poor financial condition and need increased revenue." (R. 22.) As to the Illinois Central, the principal respondent, it found that the diversion of the sugar traffic to the barge lines in 1932 cost it probably half a million dollars in revenue. (R. 37.) Further, that "the prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South." (R. 37.)

But the Commission did not overlook the rights of the water and truck carriers and the value of their services to the public. It expressly so declared in its report:

> While the loss of traffic by the rail carriers is a matter for our serious considera-

tion, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public convenience and necessity. See *Procedure under Barge Line Act*[6], 148 I.C.C. 129; *Through Routes and Joint Rates*, 153 I.C.C. 129; *Application of Mississippi Valley B. L. Co.*, 167 I.C.C. 41; *Application of American B. L. Co.*, 182 I.CC 521; and subsequent reports (R. 22.)

The proposal of the railroads to reduce their rates was to afford them *equality of opportunity* in their competition with the water lines. To repeat, for emphasis, what we have said once before, the Commission found that the rail carriers, in proposing reductions in their rates, had done so "*with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent.*" (R. 22.)

The position of the appellant comes to this, that the railroads should have been required to maintain their former rates, which were greatly in excess of the rates of the water carriers, so that the latter might continue to handle practically all of this sugar traffic.

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[6] Meaning the Denison Act, amending the Inland Waterways Corporation Act. The provisions of this amendatory act were recently before the Court, *United States* v. *Illinois Central R.R. Co.*, — U.S. —, No. 422, decided March 5, 1934, not yet reported.

The action of the Commission in permitting the rail carriers to make reductions in their rates to put them on a basis of competitive equality with the water lines is not contrary to congressional policy. That policy does not contemplate a rate adjustment that will enable the water lines to obtain practically all of a competitive traffic. The true policy, as shown by the applicable statutes read together, reference to which is made in the succeeding section of this brief, is that the rates shall be adjusted so as to be reasonable and fair to both the rail and water carriers.

(a) No provision of Transportation Act, 1920, or of the Interstate Commerce Act guarantees to appellant that the rates of competing railroads will be kept high enough to enable appellant to maintain rates which, though differentially lower, are yet sufficiently high to enable appellant to continue in business as a profitable operation

Appellant repeatedly asserts that the Commission's order deprives it of a right, given it by section 500, Transportation Act of 1920, to its continued existence as a common carrier by water. The contention is based largely, if not wholly, upon a statement made by a traffic official of the appellant, in an affidavit introduced before the court below (R. 130) to the effect that if any sugar is to move over barge lines, it will be necessary for the barge line to reduce its rate for the port-to-port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such

a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the past, will necessarily result in a material and substantial depletion of its revenue and, in the opinion of the affiant, will render the continued operation of the Mississippi Valley Barge Line an unprofitable undertaking. (R. 133–134.)

It may be, of course, that in any event, no matter what its rates were and regardless of what rates were maintained by the competing railroads, appellant would be unable to obtain sufficient sugar or other traffic to enable it to continue in operation as a profitable undertaking. But the facts seem to indicate that appellant may be able to make rates lower than those approved by the Commission for the railroads and yet high enough to yield a profit. Attention has already been called to the Commission's finding that the reduced rates as proposed by the railroads, e.g., 30 cents from New Orleans to Chicago, yielding a minimum per-car revenue of $240, are "high enough to pay more than the cost of the service" and that therefore the rates approved by the Commission, 4 cents higher than proposed, yield a substantial margin above the cost of the service, the rate of 34 cents from New Orleans to Chicago, as approved, yielding a minimum per-car revenue of $272. This finding is to be considered in the light of appellant's own admission, appearing on page 62 of its brief, that it is "a fact beyond the peradventure of dispute that water transportation is an operation which can be con-

ducted at substantially less cost than transportation by rail." If this is so, it follows that appellant can make a rate differentially lower than the competitive rail rate and yet leave a wide margin of profit, provided of course it can obtain a sufficient volume of business. Reductions in its rates may attract more business in its competition with the contract barge lines and in the competition with the rail and water lines from the eastern seaboard and elsewhere. In this connection the following statement in the Commission's report is relevant:

> Respondents are here seeking not only some of the traffic which might otherwise move by barge lines from the New Orleans district, but naturally some of that which might otherwise come from different sources of supply, particularly that by water from New York and California. The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The refiners are dependent for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the northern markets open to them. Incidentally, the barge lines have already done much to that end. (R. 37.)

Section 500 is a declaration of policy appearing in the Transportation Act, relating to numerous important subjects of interstate commerce, admin-

istration of which is confided to the Commission, and numerous expressions of the Commission show that it has regarded it as its duty to give effect in rate making and otherwise to the policy expressed. For example, in a very recent case, *Coal, Bituminous, Ex-River, from Colona and Conway, Pa.*, 197 I.C.C. 617, 633, the Commission said:

> The policy of Congress as declared in section 500 of the Transportation Act is to promote, encourage, and develop both rail and water transportation service and facilities. The ex-river rates naturally represent a part of a transportation that has taken place prior to the movement by rail. The barge or river service is unregulated by Federal authority as to charges for such service. Argument was presented that section 500 of the Act was not a mandate of Congress, but is merely an expression of policy to promote, encourage, and develop water-transportation service and facilities, and, at the same time, to foster and preserve rail transportation. Whether the expression of Congress is to be regarded merely as a policy, or otherwise, the fact remains that that policy, if it be merely a policy, has not been altered since the time of its expression, and it is our duty as an agent of Congress to carry out that policy consistent with existing law.

Reference to other similar expressions are given below.[7]

The question whether this is a right or wrong interpretation of the Congressional declaration is not in issue in this case. Compare *Ann Arbor R.R. Co.* v. *United States;* 281 U.S. 658, holding that the words of the somewhat similar declaration in the Hoch-Smith resolution "are more in the nature of a hopeful characterization of an object deemed desirable if, and insofar as, it may be attainable, than of a rule intended to control rate making." (*Ibid.,* 669.)

But it is manifestly impossible to spell out of the declaration in section 500 any guaranty such as claimed by appellant. And it confers no legal right upon appellant enforceable through judicial procedure. Other provisions enacted by the same act did confer many legal rights upon water carriers. For example, in the limitation upon the Commission's power to establish through routes and joint rates in section 15(4) of the Interstate Commerce Act, added by section 418 of Transportation Act, 1920, under which the Commission was prohibited

[7] *State of New York* v. *N. Y. C. R.R. Co.*, 95 I.C.C. 119, 130 (order sustained, *U.S.* v. *N. Y. C.*, 272 U.S. 457); *Reduced Commodity Rates to Pacific Coast*, 89 I.C.C. 512, 538; *Consolidated Southwestern Cases*, 123 I.C.C. 203, 341; *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70–71; *Through Routes and Joint Rates between Ohio and Mississippi Transit Co. and Other Common Carriers*, 156 I.C.C. 724, 727–728; *Ex-Ohio-River Coal to Ohio Points*, 185 I.C.C. 211, 219; *Southern Pacific Transcontinental Cases*, 182 I.C.C. 770, 783–784, *Application of American Barge Line Co.*, 190 I.C.C. 177.

from establishing any new through route which "short-hauled" a carrier (cf. *United States* v. *Mo. Pac. Ry. Co., Subiaco* case, 278 U.S. 269), an exception was made where one of the carriers in the route is a water carrier, the effect being to specifically authorize the Commission to establish new through routes under which a rail carrier is required to surrender traffic to a competing water carrier short of destination or short of the terminus of the rail carrier's line (see *Procedure under Barge Line Act,* 148 I.C.C. 129, 133; see also *Chicago R. I. & P. Ry.* v. *United States,* 274 U.S. 29, 34); and the Commission has established many such routes. (See *Through Routes and Joint Rates,* 153 I.C.C. 129, 172 id. 525, 181 id. 675, 192 id. 173; 192 id. 663, and others.)

By section 15 (1) of the Act, also added by section 418 Transportation Act, 1920, the Commission was given the *minimum rate-making power* (the power exercised by the present order as to the proposed rates under which the Commission prevented the rail carriers from making rates as low as they desired) but, in order to give special protection to water-competitive transportation, Congress made an exception in the case of a through route where one of the carriers is a water line, as to which the Commission may prescribe only maximum rates. Consequently, while the Commission can control the lower level of railroad rates, it is without power to prevent a water carrier from maintaining a rate that is too low, even though the rate is a joint rail-

and-water rate subject generally to the Commission's jurisdiction. This limitation on the Commission's power, where one of the carriers is a water line, is repeated in par. 3 of section 15, in connection with the establishment of through routes and joint rates thereover. (See *Alan Wood Steel Co.* v. *Alabama G.S.R. Co.*, 190 I.C.C. 3, 11, 12. Of course the port-to-port rates of independent water carriers are in no respect subject to regulation by the Commission.)

An earlier provision, added by the Act of June 18, 1910, that enured to the benefit of water carriers, was the last paragraph of section 4, providing that: "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." (cf. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557.) (See also section 5 (19), (20) and (21) and section 6 (13), reproduced in the Appendix.)

Other rights were conferred upon water carriers by the Denison Act of 1928, amending and strengthening the Inland Waterways Corporation Act of June 7, 1924. This amendatory act, in section 3(e) provides that any person, firm, or corporation,

including the Inland Waterways Corporation, engaged or about to engage in conducting a common carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may, upon application to the Commission, obtain a certificate of public convenience and necessity in accordance with section 1 of the Interstate Commerce Act, and that the Commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates," and shall, in such order, "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission." The Commission is further directed to require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of these differential rates, and if they are unable to agree within a time specified in the act, the Commission shall determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates.[8]

[8] That the Commission has given full effect to this declared policy of Congress and to the provisions of the statutes enacted to carry this policy into effect is amply demonstrated by its reports in numerous proceedings under the statutes. The first of these was *U.S. War Department* v. *A. & S. Ry. Co. et. al.*, 77 I.C.C. 317; which deals comprehensively with the subject matter. A few subsequent reports are *Same* v. *Same*, 83 I.C.C. 742; *Same* v. *Same*, 92 I.C.C. 528; *Same* v. *Same*, 100 I.C.C. 491; *Same* v. *Same*, 144 I.C.C. 431; *Same* v. *Same*, 151 I.C.C. 91; *Same* v. *Same*, 155 I.C.C. 343; *Inland*

By these specific statutory provisions Congress has given water carriers numerous rights, remedies and exemptions. These specific provisions were enacted in furtherance of the declaration of policy made in 1920. For instance, the act of June 7, 1924, creating the Inland Waterways Corporation declared it was done so for the purpose "of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such act * * *." (This act further declared the policy of Congress, in section 3(c), reproduced in the Appendix.).

Appellant is entitled to the protection afforded and advantages given by these specific provisions.

But if the declaration of policy were interpreted as affording a guaranty to water carriers of their continuance in existence as profitable operations, at all events, then the language of the declaration

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Waterways Corp. v. *C. G. W. R.R. Co.* et al., 129 I.C.C. 521; *Same* v. *Beaumont, Sour Lake & Western Ry. Co. et al.*, 142 I.C.C. 9; *Sugar Stored in Transit at Mississippi-Warrior Service Ports*, 146 I.C.C. 382; *Inland Waterways Corp* v. *Alabama G. S. R. Co. et al.*, 151 I.C.C. 126; *Through Routes and Joint Rates between Inland Waterways Corp. and Other Common Carriers*, 153 I.C.C. 129, 172 I.C.C. 525, 181 I.C.C. 675, 192 I.C.C. 173; *City of St. Paul* v. *Chicago, B. & Q. R.R. Co.*, 168 I.C.C. 379, 192 I.C.C. 79; *Cotton from South and Southwest*, 183 I.C.C. 33; *Inland Waterways Corp.* v. *Aberdeen & R. R.R. Co.*, 183 I.C.C. 761; *Inland Waterways Corp. Through Routes and Rates*, 192 I.C.C. 663.

could be carried to vague, unreasonable, unlimited, unforeseen lengths.

Moreover, appellant's contention overlooks the declared purpose of Congress to foster and preserve railway transportation as well as water transportation. In the 1920 act Congress enacted many provisions looking to the development and maintenance of an adequate railway service in the public interest. This purpose has been explained in many decisions of this Court. The first was the familiar decision in *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, in which the Court, referring to Transportation Act, 1920, at page 585, said:

> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an *adequate railway service* for the people of the United States.

The "other important steps" have been explained many times by this Court in cases so familiar it is only necessary to cite them: *New England Divisions Case*, 261 U.S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 477–478; *Railroad Comm. of California* v. *Southern Pacific Co.*, 264 U.S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 277; *Colorado* v. *United States*, 271 U.S. 153; *United States* v. *Louisiana*, 290 U.S. 70.

Recently the Congress has enacted legislation "to relieve the existing national emergency in relation

to interstate railroad transportation." Emergency Railroad Transportation Act, 1933, approved June 16, 1933, c. 91, 48 Stat. 211. This act was passed, among other reasons, "in order to safeguard and maintain an adequate national system of transportation." The precarious financial condition of the railroads, as fully demonstrated by the facts and figures given in the Commission's report in *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, was not due entirely to the economic depression, but was due in large part to competition of other transportation agencies, particularly trucks, busses and waterways. See the Commission's discussion in the last-cited case under the heading "The Railroad Future," page 580, et seq. Indeed, it is a matter of common knowledge that trucks and water carriers have made deep inroads into the traffic formerly carried by the railroads, and that many railroads are now struggling for existence.[9]

The conclusion follows that, in order to maintain an adequate national railway service and also to preserve in full vigor both rail and water transportation, the provisions of the various statutes relating to railway and water transportation are to be construed so as to give rail and water car-

[9] See Commission's Annual Report to Congress for 1932, pages 1–6 et seq.; Annual Report for 1933, page 1 et seq.; see also Report of the Federal Coordinator of Transportation dated March 10, 1934, dealing, *inter alia*, with the question "Is there need for Federal legislation to regulate other transportation agencies, and to promote the proper coordination of all means of transport?"

riers equality of opportunity for competitive traffic. No statutory provisions guarantees to appellant that the rates of the railroads with which it competes will be kept high enough to enable appellant to maintain rates lower than the railroad rates and yet high enough to enable it to continue profitably as a water carrier. It seems certain that there is nothing in section 500 of the Transportation Act of 1920, relied upon by appellant, that prevents the railroads from making reductions in their rates, not down to a noncompensatory basis, but to a level well above the cost of furnishing the service, nor that prevents the Commission from permitting such reduced rates, published and filed by the voluntary act of the carriers, when, after full investigation and ascertainment of all the facts, the Commission is unable to find that such proposed rates are unlawful in any respect.[10]

[10] The following is said in respect of "equality of opportunity" in the Commission's report in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 56: "The rail lines contend that the proposed rates are no lower than are necessary to yield them a fair share of the business. A fair share of the business seems to be regarded as such an amount thereof as can be secured under equality of opportunity. Equality of opportunity may be defined as such an adjustment of rates as would cause a business man, under ordinary circumstances, to reach the conclusion after considering service and rates that he would ordinarily be as willing to send traffic by water as by rail, or vice versa.

(b) The contention that the Commission's report admits the order sanctions a violation of section 500, Transportation Act, 1920, is unfounded

Appellant's brief lifts parts of sentences from the Commission's report and urges they constitute an admission that the order sanctions a violation of the declaration of policy in section 500. Appellant's brief says, page 60, that "The rates authorized by the Commission are such as will 'dry up the water movement', and 'be a staggering blow to water transportation' and 'take away the net earnings of the Federal Barge Line.'" The first excerpt is taken from the sentence in the Commission's report reading:

> The proposed rates, as applied to the interior points alone, would probably bring respondents a heavy traffic, would stop a large part of the distribution of the water-borne sugar, and dry up much of the water movement. (R. 42–43.)

But these were some of the reasons why the Commission did not approve the proposed rates. The Commission did not find, or suggest, that the substantially higher rates that it did authorize would have that effect. Such result may not be inferred. It must be presumed, too, especially since the evidence introduced in the Commission proceeding has not been put before the Court, that the rates approved by the Commission, in the exercise of its administrative functions, which rates were neither those proposed by the railroads nor the appellant,

are lawful rates. Compare *Keogh* v. *C. & N.W. Ry. Co.*, 260 U.S. 156, 160, 161, 162.[11]

The next excerpt appears in the following context:

> Protestant urges that respondents have conspired in restraint of trade and in violation of the antitrust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. (R. 46.)

Clearly there is nothing to show that respondents have succeeded in monopolizing the traffic under consideration.

The third excerpt is taken from the following language in the Commission's report:

> These standard barge lines get most all the sugar traffic, principally because of their 10-cent differential, which the proposed rates, if the 80-per cent basis is continued, would reduce to 5 cents. If the differential is substantially reduced, the standard barge lines will get less sugar, and lower rates on such of it as they do handle. Barge [such] rates, made on the 80-per cent basis, if applied to the tonnage moved by the Federal

[11] There, upon the filing of certain rates, they were suspended by the Commission for investigation. After extensive hearings the rates were approved by the Commission. The Court said: "All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U.S. 294. * * * The rates complained of have been found by the Commission to be legal."

> Barge Line in 1931, would have cost that carrier about $350,000 and wiped out its showing of net revenue. (R. 46.)

Here again the Commission was talking about the *proposed* rates and not the rates 13 or 14 percent higher which the Commission approved. It is significant, too, that the Federal Barge Line was not a protestant in the Commission proceeding, and that it did not join appellant in this suit.

Appellant's brief further says: "The admitted result which will obtain under the rates approved or authorized by the Commission will be to take sugar tonnage from the water lines and cripple or eliminate water transportation." No admission that the rates approved or authorized by the Commission will cripple or eliminate the water lines is to be found in the Commission's report.

II

Appellant was accorded a full and fair hearing and the Commission's denial of its petition for rehearing was not an abuse of discretion

Appellant does not deny that it was permitted to intervene in the Commission's proceeding, to participate therein as a party protestant against the proposed rates, to submit whatever relevant evidence it desired to offer, to file printed briefs, and to make oral argument before the Commission upon the issues involved. Its contention that it was denied a fair hearing is grounded solely on the Com-

mission's refusal to grant its petition for rehearing alleging changed conditions.

The hearing in this case was held during October and November 1932, and a large volume of testimony, as indicated by the Commission's report, was introduced. The case was submitted March 2, 1933, and decided July 3, 1933, eight months after the date of the hearing. The appellant's petition to the Commission for rehearing, based on alleged changed conditions, was filed 22 days after the date of the Commission's report. Appellant relies solely upon *A., T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248, holding that the Commission's denial of the petition, filed in February, 1931, for rehearing of the case in which the record before the Commission closed in September, 1928, was not within the permitted range of the Commission's discretion (under section 16a), but was a denial of right. There the Court took judicial notice of the changes in conditions. The depression, it said, "is the outstanding contemporary fact, dominating thought and action throughout the country." Further, the Court said: "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—can not be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

In the case at bar it is clear there were no fundamental changes in conditions during the short period intervening between the close of the hearing in November, 1932, and the date of the Commission's report in July, 1933.

We think, as the court below held, that appellant's contention in this respect "is sufficiently answered by the language of the Supreme Court in *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 494," in which the Court said:

> The decision in the *Santa Fe* case (284 U.S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.

III

No showing having been made that the Commission's order subjects appellant to legal injury, actual or threatened, appellant is without right to maintain this suit

Appellant is a common carrier engaged in transportation by water from New Orleans to points on the Mississippi and Ohio rivers. As such carrier it competes with the railrads for traffic, and particularly for the sugar traffic under consideration. Although it protested to the Commission against

the reduced rates proposed by the railroads, and was a party to the proceedings conducted by the Commission, it is not a respondent to the order issued by the Commission, nor does the order make any requirement of it or in connection with it or its rates. The sole basis for its complaint is that since the Commission by its order declined to prevent the railroads from reducing their rates, and gave its authorization to the establishment of reduced rates, appellant's competitive position will not be as favorable in the future as it has been in the past.

But appellant has no legal right, either by statute or at common law, to carry any particular share of prospective traffic. *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768, 780; *Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249. (Compare concurring opinion of Mr. Justice Stone, concurred in by Mr. Justice Brandeis, Mr. Justice Roberts and Mr. Justice Cardoza, in *United States* v. *Illinois Central R.R. Co.*, No. 422, October Term, 1933, decided March 5, 1934.)

This case therefore seems to be within the rule of *Edward Hines Trustees* v. *United States, supra*, a suit to enjoin an order of the Commission requiring certain railroads to cease and desist from collecting so-called penalty charges. There, the appellants, engaged as lumber dealers, and having

under construction a local railroad in Mississippi, claimed the order infringed their rights both as shippers and as prospective carrier. The Court said (263 U.S., at page 148):

> * * * But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which

they were made is not before the Court. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U.S. 114.

Similarly, appellants in the case at bar have no absolute right to require their rail competitors to impose higher rates than those found lawful by the Commission.

The case at bar is not like the *Chicago Junction Case,* 264 U.S. 258, for there the order violated legal rights of the complaining carrier under section 5 (2) of the Interstate Commerce Act to equal treatment, this distinction having been pointed out by this Court in *Sprunt & Son* v. *United States,* 281 U.S. 249, 257, note 5. Nor is the case at bar like *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 257, for as likewise stated in note 5 on page 257 of the *Sprunt* case, the right under the last paragraph of section 4 of the act, not to pay increased rates except when due to reasons other than the elimination of water competition, was clearly the right of the shipper. Nor is it like cases such as *Chesapeake & Ohio Ry.* v. *United States,* 283 U.S. 35, and *Claiborne-Annapolis Ferry* v. *United States,* 285 U.S. 382, where the right of a railroad to bring suit to enjoin and set aside a certificate of public convenience and necessity to a competing line is predicated upon a right expressly given in section 1 (20) of the act.

In the *Sprunt* case, at pages 256–257, the Court said:

> Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 147, 148 and *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178, 188. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Village of Hubbard*, 266 U.S. 474; *The Chicago Junction Case*, 264 U.S. 258; *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside.

In the case at bar appellant "readily concedes that the removal of a competitive advantage, or even the diminution of a competitive quality, to which a party has no legal right, does not give that party any standing in court." (Appellant's brief, P. 84.) It is appellant's position that the Commission's order infringes some legal right granted it by the congressional policy declared in Section 500 of Transportation Act, 1920. The thought seems

to be that because Congress declared in that section that its policy is to promote water transportation and to foster and preserve in full vigor both rail and water transportation, the Interstate Commerce Commission is bound to require all railroads competing with water lines to keep their rates so high that their competition with the water lines will be ineffectual, to the end that the water lines will be able to carry a share of the competitive traffic sufficient to enable them to continue in business.

But obviously Section 500 is not to be so construed. Appellant competes not only with the railroads but also with other water lines on the same waterways. The Commission granted it a certificate of public convenience and necessity and fixed its joint water-and-rail rates differentially under the all-rail rates, in pursuance of Section 3 (e) of the Denison Act. No provision in the Interstate Commerce Act or in any other statute gives it the right or puts the duty upon the Commission to keep the rate of the railroads at any particular level. The railroads have the right to compete for this traffic, and obviously the Commission is without authority to prevent the railroads from maintaining competitive rates, provided only that those rates are lawful rates under the Interstate Commerce Act or other applicable statute.

The assertion that the order sanctions a violation of the anti-trust laws is patently unsound. Appellants, who with other water lines now enjoy prac-

tically a monopoly in the sugar traffic under consideration, charged before the Interstate Commerce Commission that the railroads have conspired to monopolize this sugar traffic, as shown by the following excerpt from the Commission's report: "Protestant urges that respondents have conspired in restraint of trade and in violation of the anti-trust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow." (R. 46.)

But, as stated in the Commission's order of July 3, 1933, the Commission suspended the operation of the railroads' schedules so far as they proposed changes in the rates on sugar and "entered upon hearings concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules.", (R. 64.) This is strictly in accordance with the language of Section 15 (7) of the Act authorizing the Commission to "enter upon a hearing concerning the lawfulness" of any suspended new rate, etc. The Commission found that the most important rates proposed by the carriers were too low and gave its approval only to rates which were substantially higher. It seems undeniable that the rates which the Commission itself proposed, namely, rates 13 to 14 percent higher than those proposed by the carriers, were regarded by it as lawful rates under the Interstate Commerce Act and other acts which the Commission administers. Hence, even if it be admitted, for the sake of discussion, that the carriers intended to make rates so low as to drive

out water competition, their intention was frustrated by the action of the Commission in refusing to approve rates as low as they proposed. And this restraining influence will continue in the future, any further proposed reduced rates by the railroads likewise being subject to suspension, and investigation by the Commission concerning their lawfulness. Therefore, the charge of alleged conspiracy to monopolize the sugar traffic, by means of rates low enough to drive the water lines out of business, disappears. Compare *Keogh* v. *C. & N.W. Ry. Co.*, 260 U.S. 156. The mere allegation in a bill under the Urgent Deficiencies Act to enjoin and set aside an order of the Commission, within the exclusive jurisdiction of a specially-constituted district court, having only the limited jurisdiction conferred upon it by the statute, not including the authority to determine an alleged violation of the antitrust laws, would not give the petitioner a standing to maintain the suit.

Nor do the unsupported allegations that the order authorizes rates that violate the undue prejudice clause of section 3 or the long-and-short haul clause of section 4 of the Interstate Commerce Act give the appellant standing. There was no finding by the Commission that the rates it approved would bring about such violations. Those allegations, if true, do not affect appellant. The court "will not listen to a party who complains of a grievance which is not his." *Interstate Commerce Commission* v. *Chi., R. I. & Pac. Ry.*, 218 U.S. 88, 109. The

alleged violation of section 3 is that the reduced rates apply to points such as Paris, Ill., and Des Moines, Iowa, whereas the former rates will continue to apply to nearby points such as Terre Haute, Ind., and Davenport, Iowa. (See report, R. 47, 48.) But as the Commission said, these contentions were not supported by any evidence of injury and no one appeared who might be adversely affected. (R. 47, 48.) These are not appellant's grievances. But even if they were, that is to say, even if they were matters which affected appellant and of which appellant would be entitled to complain, they would not give appellant standing to maintain this suit. In order to maintain the suit appellant must show that the order deprives it of a definite legal right, as in the *Chicago Junction* case and others like it, as distinguished from a right the determination of which is within the administrative judgment of the Commission, such as whether a rate is unreasonable, unduly prejudicial or unjustly discriminatory, in violation of sections 1, 2, 3 and 4 of the Act. *Sprunt* case, *supra*, page 255; *United States* v. *Merchants & Mfrs. Asso.*, 242 U.S. 178, 188; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Great Northern Ry. Co.* v. *Merchants Elev. Co.*, 259 U.S. 285, 295; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322; *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 361; *Davis* v. *Portland Seed Co.*, 264 U.S. 403.

CONCLUSION

It is respectfully submitted that the decree of the court below denying the prayer of and dismissing the bill should be affirmed.

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MARCH 1934.

APPENDIX

The Interstate Commerce Act (U.S.C. Tit. 49) provides:

SECTION 1: "

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *

SECTION 5:

(19) From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight

or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(20) Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competion or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(21) If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may con-

tinue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided,* Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

SECTION 6:

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits

of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrange-

ments with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

SECTION 15:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or

minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto) and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The

Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as

in its opinion are necessary or desirable in the public interest.

* * * * *

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case

of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 16a:

That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obey-

ing any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Section 201, Transportation Act, 1920, c. 91, 41 Stat. 458 (U.S.C.Tit. 49, Sec. 141) provides:

(a) On the termination of Federal control, as provided in section 200, all boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise waterways (hereinafter in this section called "transportation facilities") acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act (except the transportation facilities constituting parts of railroads or transportation systems over which Federal control was assumed) are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and

assume and carry out all contracts and agreements in relation thereto entered into by or through the President in pursuance of such paragraph prior to the time above fixed for such transfer. All payments under the terms of such contracts, and for claims arising out of the operation of such transportation facilities by or through the President prior to the termination of Federal control, shall be made out of moneys available under the provisions of this Act for adjusting, settling, liquidating, and winding up matters arising out of or incident to Federal control. Moneys required for such payments shall, from time to time, be transferred to the Secretary of War as required for payment under the terms of such contracts.

(b) All other payments after such transfer in connection with the construction, utilization, and operation of any such transportation facilities, whether completed or under construction, shall be made by the Secretary of War out of funds now or hereafter made available for that purpose.

(c) [*As amended March 4, 1921.*] The Secretary of War is hereby authorized, out of any moneys hereafter made available therefor, to construct or contract for the construction of terminal facilities for the interchange of traffic between the transportation facilities operated by him under this section and other carriers whether by rail or water, and to make loans for such purposes under such terms and conditions as he may determine to any State, municipality, or transportation company; or to expend such moneys for necessary terminal improvements and facilities upon property leased from States, cities, or transportation

companies under terms approved by the Interstate Commerce Commission, or otherwise, in accordance with any order rendered by said Commission under subheading (a), paragraph 13, section 6, Interstate Commerce Act.

(d) Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above Saint Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above Saint Louis.

(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the "Shipping Act, 1916," as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein. For the performance of the duties imposed by this section the Secretary of War is authorized to appoint or employ such number of experts, clerks, and other employees as may be necessary for service in the District of Columbia or elsewhere, and as may be provided for by Congress.

Section 500, Transportation Act, 1920, c. 91, Title 5, 41 Stat. 499 (U.S.C. Tit. 49, Sec. 142) provides:

> It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.
>
> It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are

interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

The words "inland waterway" as used in this section shall be construed to include the Great Lakes.

The Inland Waterways Corporation Act, c. 243, 43 Stat. 360, approved June 3, 1924 (U.S.C.Tit. 49, Secs. 151–156) provides:

That for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government, of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such Act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this Act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

* * * * *

SECTION 3:

(a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War, under section 201 of the Transportation Act, 1920, as amended, and shall, as soon as there is an improved channel sufficient to permit the same, initiate the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) If the Secretary of War deems it advisable to discontinue the operation of any part of the transportation or terminal facilities, or to develop and operate new lines, in order to give the public the proper service, he shall report thereon to Congress. The operation of any of such facilities shall not be discontinued and new lines shall not be developed or operated until authorized by Congress.

(c) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

The Denison Act, c. 891, 45 Stat. 978, approved May 29, 1928 (Supp. VI, U.S.C. Tit. 49, Sec. 152–154) provides:

That section 2 of the Act entitled "An Act to create the Inland Waterways Corpora-

tion for the purpose of carrying out the mandate and purpose of Congress, as expressed in sections 201 and 500 of the Transportation Act, and for other purposes", approved June 3, 1924 (paragraph 152, chapter 5, title 49, Code of Laws of the United States; chapter 243, volume 43, page 360, United States Statutes at Large), be, and the same is hereby, amended to read as follows:

* * * * *

"SEC. 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this Act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

* * * * *

"(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Inter-

state Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage, in common-carrier service on such rivers.

* * * * *

"(e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions

of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commisison, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: *Provided,* That if the Inland Waterways Corporation sells or leases its transportation

facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

"(f) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels."

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